

VOON KENG & ORS.

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v.

SYKT. MUZWINA DVPT. SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-164-89]
6 MAY 1991

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LAND LAW: *Sale and purchase agreement - Plaintiffs all members of the same class - Common grievance - Vacant possession - Not within 24 months - Relevant date of electricity supply - Date of connection to individual house - Whether delay in filing application for summary judgment - Various other actions filed by plaintiffs.*

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The plaintiffs were purchasers of the relevant lots and houses developed by the defendants. The plaintiffs claim that the defendants were in breach of condition 18 of the statutory sale and purchase agreement as vacant possession of the houses was not delivered within the stipulated 24 months.

The plaintiffs were claiming *inter alia*, liquidated damages from the date of connection of electricity supply to the date of satisfaction judgment. The plaintiffs were granted summary judgment on 29 December 1990.

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This is the defendant's appeal; the first appeal which was filed on 30 November 1990 was against the ruling of the Senior Assistant Registrar that there had been no delay on the part of the plaintiffs in filing the application for summary judgment. The second appeal filed on 31 December 1990 was against the granting of summary judgment by the SAR to the plaintiffs.

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Held:

[1] In the circumstances of this case, the plaintiffs were members of the same class, had a common grievance and the relief sought was in its nature beneficial to all whom the plaintiffs represented and the representative action could therefore continue although the amounts due to each of them may well be different in view of the different dates involved as regards the sale and purchase agreements and the connection of electricity supply.

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[2] The plaintiffs had explained to the satisfaction of the Court as to the reasons for the delay, that is, the existence of other actions against the defendant which caused the plaintiff to act according to the various decisions being made in the respective applications for the other actions. Further, there could not have existed any delay since the application for summary judgment was filed only 6 days after the filing of the reamended statement of claim.

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[3] The relevant date of the electricity supply would be the date of the individual connection of electricity to a particular house rather than the date the supply is connected to the housing scheme. There was therefore no need to go to full trial to resolve this matter as the plaintiffs had adduced evidence of the actual date of electricity supply to the individual plaintiff's houses.

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[Defendant's appeal dismissed.]

Cases referred to:

Atip bin Ali v. Josephine Doris Nunis & Anor. [1986] CLJ (Rep) 283 (cit)

Duke of Bedford v. Ellis & Ors. [1901] AC 1 (cit)

Markt & Co. Ltd. v. Knight Steamship Co. Ltd. [1910] 2 KB 1021 (cit)

Mohamed Noor bin Othman & Ors. v. Haji Mohamed Ismail bin Haji Ibrahim & Ors. [1988] 1 CLJ (Rep) 224 (foll)

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- a** *Smith & Ors. v. Cardiff Corporation* [1954] 1 QB 210 (*cit*)
Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsu [1978] 2 MLJ 267 (*foli*)
Syarikat Lean Hup (Liew Brothers) Sdn. Bhd. v. Cheow Chong Thai [1988] 3 MLJ 221 (*foli*)
 For the plaintiffs - Lalchand Nathermal; M/s. Lalchand, Nawawi, Phang & Co.
 For the defendants - Leonard Anselm Gomes; M/s. L.A. Gomes & Co.

JUDGMENT

b**Abdul Malek Ahmad J:**

- The plaintiffs are purchasers of the relevant lots and houses in Taman Cahaya Bercham Ipoh where the defendants are housing developers. According to the plaintiffs' reamended statement of claim filed on 20 April 1990 pursuant to a Court order dated 11 April 1990, the defendants had been in breach of the respective statutory sale and purchase agreements as the houses were not completed and vacant possession not delivered to the plaintiffs within twenty four months of the dates of the said agreements and consequently liquidated damages from day to day at 10 per cent per annum of the purchase price was payable to the plaintiffs. The relevant details such as name of purchaser, date of agreement, purchase price, date of legal completion, date of electricity supply, period of delay and amount of liquidated damages are all provided in the annexure attached to the reamended statement of claim.

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- The reamended statement of claim also states that six entities, namely Hock Hua Bank Berhad, Ipoh (for plaintiff No. 30), Kean Chye & Sivalingam, Ipoh (for plaintiffs No. 14, 24, 46, 18 and 31), Cheang Lee & Ong, Ipoh (for plaintiff No. 15), C.W. Chew & Co., Ipoh (for plaintiff No. 22), Coopers & Lybrand, Ipoh (for plaintiff No. 59), and Abbas & Ngan, Ipoh (for the remaining plaintiffs) are withholding the last 5 per cent or thereabouts of the amounts due to the plaintiffs for which they are also claiming in addition to the agreed interest of 10 per cent per annum from the date of connection of electricity supply to the date of satisfaction and costs.

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- After hearing both Counsel orally over a number of days in addition to written submissions, the learned Senior Assistant Registrar had granted the order for summary judgment on 29 December 1990. Before me on 13 March 1991, both learned Counsel had merely relied on their written submissions and I had dismissed the defendants' appeal against the learned Senior Assistant Registrar's decision on 6 April 1991 for the following reasons.

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- It is not in dispute that the plaintiffs are relying on the standard clause 18 of their sale and purchase agreements which clearly provides that if the defendants failed to deliver vacant possession to the plaintiffs within twenty four calendar months from the date of the agreements then the defendants are immediately liable to pay the plaintiffs liquidated damages calculated from day to day at the rate of 10 per cent per annum of the purchase price.

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- As regards vacant possession, the High Court case of *Syarikat Lean Hup (Liew Brothers) Sdn. Bhd. v. Cheow Chong Thai* [1988] 3 MLJ 221, which had been upheld by the Supreme Court, had decided that vacant possession had to include the connection of water and electricity supplies to the building. This would surely mean the connection of electricity from the mains to the internal wiring of a particular house and not when electricity supply is generally available to the relevant housing scheme.

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- In an earlier hearing between the same parties as regards the setting aside of the injunction, I had already decided, having considered the cases of the *Duke of Bedford v. Ellis & Ors.* [1901] AC 1, *Smith & Ors. v. Cardiff Corporation* [1954] 1 QB 210, *Markt & Co. Ltd. v.*

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Knight Steamship Co. Ltd. [1901] 2 KB 1021, and *Atip bin Ali v. Josephine Doris Nunis & Anor.* [1986] CLJ (Rep) 283, that in the circumstances of our present case I was satisfied that the plaintiffs were members of the same class, had a common grievance and that the relief sought was in its nature beneficial to all whom the plaintiffs represented and the representative action could therefore continue although the amounts due to each of them may be different in view of the different dates involved as regards the sale and purchase agreements and the connection of electricity supply.

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The statement of defence has been of no assistance in demolishing the claim based on established legal principles. The Supreme Court in *Mohamed Noor bin Othman & Ors. v. Haji Mohamed Ismail bin Haji Ibrahim & Ors.* [1988] 1 CLJ (Rep) 224 had succinctly stated that:

For it is trite law that where the words of a statute are clear there is no room for the Court to go beyond the expressed language of the statute

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and this ruling appears to fall squarely on the facts of this case and the law applicable.

The defendants had in fact filed in two notices of appeal. The first filed on 30 November 1990 is against the learned Senior Assistant Registrar's ruling on 27 November 1990 where she held that there had been no delay on the part of the plaintiffs in filing the application for summary judgment. The main argument of learned Counsel for the appellants/defendants concerning this point was that the learned Senior Assistant Registrar had allowed learned Counsel for the respondents/plaintiffs time to file an affidavit explaining the delay in the course of submissions. In addition, learned Counsel for the respondents/plaintiffs had also explained in his submissions that the delay was due to the earlier injunction in this matter and as there were other actions against the same defendants, they had to act according to the various decisions being made in the respective applications for the other actions.

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On my part, I had been guided by the judgment in *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsu* [1978] 2 MLJ 267 where it has been held that where an application for summary judgment had been made after the delivery of the defence, the plaintiff ought to explain the reasons for the delay. Here, the plaintiffs have done so to the satisfaction of the Court and my added view was that in fact there could not have been said to exist any delay since the application for summary judgment was filed only six days after the filing of the reamended statement of claim. I had therefore accordingly held that this appeal should be dismissed with costs.

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As for the second appeal filed on 31 December 1990 against the learned Senior Assistant Registrar's decision to grant the application for summary judgment, the only main argument of learned Counsel for the defendants appears to be that the date of the actual supply of the electricity to the respective houses of the plaintiffs cannot be decided by way of affidavits and they needed to be established at a trial where all the relevant witnesses can be called. However, apart from the fact that my view is that the relevant date of electricity supply would have to be the individual connection to a particular house rather than the date the electricity supply is connected to the housing scheme based on the decision in *Syarikat Lean Hup (Liew Brothers) Sdn. Bhd. v. Cheow Chong Thai (supra)* which states supply to the building and not to the area, the plaintiffs had in fact exhibited in one of their affidavits the respective electricity account and actual date of electricity supply to the individual plaintiffs' houses which had been prepared and confirmed by the Pegawai Penjaga of Tenaga Nasional Berhad in Tanjung Rambutan which was the relevant authority in the matter. In the circumstances, to my mind, a trial would have yielded the same evidence.

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- a* Since all the particulars in the reamended statement of claim had been proved to the satisfaction of the Court despite the allegations in the statement of defence and holding that there is no substantial question to be tried as there is no dispute as to facts or law which raises a reasonable doubt that the plaintiffs are entitled to judgment and that a trial would be absolutely unnecessary and unwarranted in these circumstances, I had therefore also dismissed the defendants' second appeal to set aside the learned Senior Assistant Registrar's
- b* decision granting summary judgment to the plaintiffs on 29 December 1990.

Also found at [1991] 3 CLJ 1904

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